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# Supreme Court of the United States

October Term, 1969

## No. 531

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

versus

BOB LEROY'S, INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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# RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Bob LeRoy's, Inc., respectfully shows the Court that the relief sought by Petitioner should be denied.

## OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix A) is not yet reported. The opinion was handed down on June 23, 1969. Petitioner's Motion for Rehearing was denied on July 17, 1969.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

In answer to Special Interrogatory 1A of the District Court's charge (Tr. 339, 340) the jury found that Robert H. LeRoy was an insurable risk under the Defendant Company's rules. In connection with Question 1A the Court charged the jury (Tr. 324) that "the term 'insurable risk' means the kind of risk a reasonably prudent officer in the underwriting office of an insurance company, acting in good faith on the evidence available to him, would find to be acceptable for the type of insurance applied for . . ."

The Court of Appeals for the Fifth Circuit upheld the finding of the jury on Question 1A with the following language (set forth on p. 23 of the Petition):

> "Occidental contends that the Appellee had, but failed to sustain, the burden of proof with respect to the rules and standards of Occidental as to insurability. The record discloses that the evidence relating to this phase of the case was fully developed and that the jury was properly and adequately instructed with respect thereto."

The only question involved is whether or not there was "competent testimony" to facts which would support the jury's answer to Special Interrogatory 1A.

## THE DECISIONS INVOLVED

Prior to the handing down of the decision below the Texas Supreme Court announced its decision in *National Life and Accident Company v. Blagg*, 438 S.W.2d 905, opinion dated March 12, 1969. As in the present case, the *Blagg* decision involved a suit upon a "conditional receipt" of life insurance in which the burden was upon the Plaintiff to secure favorable findings on certain fact issues under principles laid down by the Texas Supreme Court in *United Founders Life Insurance Company v. Carey*, 363 S.W.2d 236 (1962).

In *Blagg* the Texas Supreme Court held that the question as to whether or not a reasonably prudent and careful underwriter, in good faith, would have formed the opinion that Blagg was, under the circumstances, insurable was a matter for the introduction of "competent testimony." Under the evidence in the case the Court found that "no witness gave testimony to facts which would have supported such a conclusion." Petition, pp. 5, 6, 14 and 37.

Petitioner might well have cited hundreds of other Texas cases holding that findings on ultimate fact issues must be supported by "competent testimony" to facts which would support the conclusion reached by the trier of facts.

## STATEMENT

Petitioner has restated its brief in the Court below to support its "competent testimony" point. It thus be-

comes regrettably necessary for Respondent to restate the applicable portions of its brief in the United States Court of Appeals for the Fifth Circuit.

Following solicitation by Petitioner (Tr. 49), Robert H. LeRoy and William M. Haughton, officers of Respondent corporation, made separate applications for $25,000 insurance policies (with $25,000 accidental riders) on their lives, such policies to be owned by and payable to Respondent, the proceeds of which were to be used to fund a stock purchase agreement (Tr. 48-57; P-49, 50, 52). LeRoy's application consisted of Part I, back and front (P-49), and Part II (P-50), with the back of Part II being designated "Part III — Medical Examiner's Report to be Filled out in Private."

On July 3, 1963, LeRoy was directed by Petitioner's agents to Dr. Robert H. Thayer, one of Petitioner's designated physicians (Tr. 289), for a medical examination and completion of Part II, consisting of questions relating to LeRoy's medical history, which was signed both by LeRoy and Dr. Thayer, and at such time Part III (reverse side of P-50), consisting of Dr. Thayer's medical findings, were completed and signed only by Dr. Thayer. Among other things, Dr. Thayer found LeRoy's health to be good (Question 10C) and his blood pressure, pulse rate, and heart size, rhythm and sounds, to be normal (Questions 7, 8 and 9D).

Two days later, on July 5, 1963, LeRoy completed and signed Part I of his application, and Respondent's check for $51.26 (P-54) was delivered in payment of the first premium upon LeRoy's and Haughton's identi-

cal applications. At such time a "conditional receipt" was detached from LeRoy's application and delivered to him. The terms of the contract between the parties are contained in Part I of LeRoy's application and such conditional receipt. The applicable portions of such documents are reproduced in the Petition (pp. 6 and 7).

On July 9, 1963, LeRoy's application and check were received at Petitioner's home office in Los Angeles (date stamped on exhibits). The check was immediately deposited by Petitioner and paid by the drawee bank in El Paso on July 10, 1963. Also a retail credit report dated July 9, 1963 (P-62), was run on LeRoy, which report gives a very complete and favorable description of LeRoy's health, activities, business and financial condition, as obtained from a former employer, two local businessmen, a bank official, and LeRoy himself.

On July 22, 1963, LeRoy was accidentally killed. This fact was stipulated to by Petitioner (Tr. 14). At some time between eighteen days and four weeks after LeRoy's death (three different dates being in the record — Tr. 197, 242, 243, 297, 298), Petitioner determined he was uninsurable. Later, during pre-trial discovery proceedings, Petitioner was requested to "state specifically and in detail all of the grounds' upon which it had based its decision, in reply to which Petitioner listed seven grounds (Tr. 198-200), all of which were based upon information mainly relating to LeRoy's heart contained in the hospital records of Providence Memorial Hospital (P-1 thru P-21), in which LeRoy had been

hospitalized from August 21 to August 28, 1958 (P-1) and of Southwestern General Hospital (P-22 thru P-33), in which LeRoy had been hospitalized from March 22 to March 29, 1959 (P-30). Petitioner also answered in response to a specific written interrogatory that its decision was not directly based upon the specific provisions of an underwriting manual, document or rule (Tr. 200). Petitioner later amended such answer and referred to a specific paragraph of its underwriting manual, which it stated it had relied upon in addition to its normal underwriting procedures. This amendment was carried forward in the Court's Pre-trial Order (Tr. 14). There was no testimony at the trial concerning Petitioner's underwriting manual, although Mr. Logan, Petitioner's underwriter who made the decision that LeRoy was uninsurable, was present and testified (Tr. 260 et seq.).

At the trial Respondent produced the testimony of three of LeRoy's doctors (Drs. Gladstone, Logsdon and Searls) and four lay witnesses (Haughton, Milner, Wilson, and Mrs. LeRoy, now Mrs. Abbott), for the purpose of proving that there was nothing wrong with LeRoy's heart, and that, as of July 5, 1963, LeRoy was not only in "good health," he was in "superior health" (Tr. 68, 69).

Respondent's chief medical witness was Dr. Larry A. Gladstone, a heart specialist (Tr. 74, 75), who had on August 21, 1958, been referred to LeRoy's wife by their family doctor, Dr. Joe Galatzan, when she had reported to him that she thought LeRoy was "having a heart attack, because he has a severe pain in his

chest," to which Dr. Galatzan had replied "Mrs. LeRoy, I know nothing of the heart" (Tr. 144). Dr. Gladstone at such time placed LeRoy in Providence Memorial Hospital and attended him during the week of hospitalization (Tr. 79).

At the time of his admission LeRoy gave Dr. Gladstone a history (P-2) of having had in 1947 a "mild heart attack" consisting of an anterior chest pain and a fainting episode. This history was recorded by Dr. Gladstone in his own handwriting, and in as near LeRoy's own words as possible. It was inconceivable to Dr. Gladstone that any one having a coronary would not have had an EKG taken (as was reported in the history), and because LeRoy apparently got over the problem quickly, Dr. Gladstone didn't take the history of a coronary very seriously (Tr. 81, 82). Dr. John Searls, who had been the LeRoys' family doctor in Marfa, Texas, where they resided in 1947 (Tr. 156), testified for Respondent by deposition that, to his knowledge, LeRoy had never had a heart problem (Tr. 156-159).

Dr. Gladstone's working diagnosis at the time of LeRoy's admission to Providence Memorial Hospital on August 21, 1958, (P-3) included the possibility of "myocardial infarction" (commonly known as a "coronary" or heart attack — Tr. 86) in addition to "pericarditis" (an inflammation of the sac around the heart, the "pericardium" which does not involve the heart itself — Tr. 80), the pain caused therefrom being often indistinguishable from an acute coronary (Tr. 115, 116), and pneumonia. Dr. Gladstone's final diagnosis (P-3)

was pneumonitis and "pleuropericarditis" (a combination, which infrequently occurs, of pericarditis and pleurisy, an inflammation of the "pleura," the lining around the lungs — Tr. 89, 112), which Dr. Gladstone felt was caused by the same virus which he felt had caused the pneumonia (Tr. 88, 90). Dr. Gladstone based his final diagnosis of "pleuropericarditis", as opposed to a coronary, upon the evolvement of the EKGs taken during the week of hospitalization (Tr. 85, 86, 114, 115; P-2 thru P-21), the chest X-ray reports (Tr. 109; P-4 thru P-6), a transaminate test (Tr. 85; P-7), and the entire clinical picture, including personal observation (Tr. 86, 87). Dr. Gladstone made no notation in the hospital records indicating a heart condition, because he felt LeRoy had none (Tr. 83-85). At the time of LeRoy's discharge Dr. Gladstone felt he had completely recovered from the pleuropericarditis and Dr. Gladstone did not prescribe any medication for LeRoy, did not restrict his diet, activities, drinking or smoking, nor set up a further series of EKGs for LeRoy (Tr. 90-94).

Dr. Gladstone saw LeRoy in his office on August 29, 1958, the day after LeRoy left the hospital, and again on September 11, 1958, at which time a perfectly normal EKG was taken, which indicated a rapid recovery by LeRoy of the pleuropericarditis, and which confirmed Dr. Gladstone's final diagnosis at the hospital. At such time he told LeRoy to go back to work (Tr. 80, 89, 90, 116, 118; P-44, 47, 55, 56). Dr. Gladstone thereafter saw LeRoy on September 17, 1958, at which time LeRoy was complaining of "light headaches since yesterday," but his chest was clear and heart negative (P-47), again saw LeRoy on November 21, 1959, when he was

complaining of an anterior chest pain, but an EKG was negative, and Dr. Gladstone thought LeRoy had a cold and gave him some antibiotics (Tr. 99, 100; P-57, 58). Dr. Gladstone next saw LeRoy on June 20, 1961, when LeRoy came in for a medical check up, and Dr. Gladstone ran another EKG, which was normal (Tr. 100, 101, 104; P-59, 60), and which was the last EKG run on LeRoy by Dr. Gladstone. All of these EKGs taken over almost a three year span indicated to Dr. Gladstone that LeRoy had a normal heart and that it was not very likely that there was any disease process going on in LeRoy's heart (Tr. 118, 119).

Dr. Gladstone last saw LeRoy on June 27, 1962, when LeRoy was complaining of a pain at the juncture of the rib cartilege, which is a chest wall pain. At such time he injected LeRoy with cortisone and LeRoy did not return. At such time LeRoy was in good health and made no complaint about his heart (Tr. 104, 105). Finally, Dr. Gladstone testified that LeRoy "had no heart trouble at all" (Tr. 99, 118), and that if LeRoy had had any serious cardiac condition he didn't believe LeRoy could have pursued the schedule of strenuous activities described to him (Tr. 118).

During the period of LeRoy's hospitalization in August, 1958, Dr. Charles Logsdon, a cardiologist (Tr. 162), who did not know LeRoy (Tr. 162, 163), interpreted several of the EKGs, which he found at the time to be abnormal (P-12 thru P-17). Dr. Logsdon was called as a witness by Respondent. He testified that the Providence Memorial EKGs, as a whole, showed a "mild, persistent inflammation" (Tr. 167), and that the X-ray

reports tended to "confirm the diagnosis of pericarditis" (Tr. 170). He further testified that, on the basis of all the EKGs in evidence, that in his opinion LeRoy had a "normal heart" (Tr. 188).

When LeRoy was admitted to Southwestern General Hospital on March 22, 1959, he reported in his history that he had had "a slight heart attack September 58, hospitalized at Prov. Mem." (P-22). Dr. Gladstone had testified (Tr. 95) that LeRoy did not have a heart attack at Providence Memorial Hospital in August, 1958 (presumably the hospitalization LeRoy was referring to, as Dr. Gladstone had had LeRoy under his supervision in September, 1958 — Tr. 248), and that he had never told LeRoy he had had a heart attack (Tr. 93).

During LeRoy's March, 1959, hospitalization, only one EKG had been run (P-31, 32), which was interpreted by Dr. Ralph Homan as showing "mild coronary insufficiency. No acute changes" (P-24). However, both the working and final diagnoses by Dr. Joe Galatzan were "pneumonia bilateral severe" (P-23) and a physical examination dated March 22, 1959, showed LeRoy's heart to be "normal" (P-23). Dr. Gladstone had testified (and even Petitioner's witness, Dr. Ryan, admitted — Tr. 234) that a diagnosis cannot be made on the basis of one EKG, but that it takes a series of EKGs, together with other tests, all interpreted in the light of the entire clinical picture, to diagnose a heart condition (Tr. 86), and that the reader of an EKG gives only what may be helpful to the attending physician (Tr. 88). Dr. Gladstone further testified that abnormal EKGs can be caused by many things not connected

with the heart because the body itself conducts electricity, and the contacts used in taking the EKG readings are with the two arms, two legs, and across the chest (Tr. 135-137).

Respondent's lay witnesses testified as to the unusual health and vigor of LeRoy over a number of years, which was undiminished at the date of his death (Tr. 47, 48, 67-71). LeRoy had been a professional baseball player on a championship team (Tr. 71), was a better than average bowler and golfer and had won many trophies in both sports (Tr. 34). To the time of his death he bowled at night during the week and played golf several times a week, usually 27 holes at a time (Tr. 25, 26, 33, 34, 44, 45, 64, 65, 66), had played in a two day golf tournament on the weekend of July 3, 1963 (Tr. 69), and had just finished a four day golf tournament the weekend prior to his death (Tr. 70, 150). LeRoy was never absent from work except to play golf (Tr. 48), was always active and energetic, and never complained or seemed to feel bad, tired or winded, and always wanted to bowl another frame or play another nine holes (Tr. 31, 47, 66, 67, 68, 69). LeRoy never took medicines or dieted (Tr. 46, 66, 146, 148).

LeRoy did not solicit the insurance from Petitioner (Tr. 49). Part I of the application (P-49) showed that LeRoy had obtained insurance from other companies both shortly prior to and after the two periods of hospitalization in 1958 and 1959.

By its "Attending Physician's Statement" dated July 12, 1963 (P-46, D-1), Petitioner requested medical infor-

mation concerning LeRoy from Dr. Gladstone. On July 30, 1963, Dr. Gladstone replied, reporting, among other things, the pleuropericarditis in August, 1958, with a full recovery in 2-3 weeks, and that in June, 1961, he had run an EKG, which was normal. No further inquiry was made of Dr. Gladstone by Petitioner, written or otherwise, regarding the EKGs or medical examination (Tr. 105-108, 299).

Petitioner called as its only witnesses Dr. Ryan, a medical doctor employed by it in its medical department, who had not participated in the deliberation concerning LeRoy's insurability (Tr. 225), and Mr. Logan, employed as an underwriter by Petitioner, who had participated in the LeRoy decision (Tr. 265). Both testified that they were familiar with the underwriting rules and procedures of Petitioner (Tr. 215, 263) and testified at length regarding their application to LeRoy.

Dr. Ryan stated that the "pericarditis" alone (in August, 1958) would have made LeRoy a sub-standard risk for a period of several years, but for how many years he would not say (Tr. 230, 231). Dr. Ryan further testified (Tr. 223) that "pericarditis is a condition of the heart which is *less serious* and *might explain some* of those electrocardiographic abnormalities, but it would certainly not explain the *long history of chest pain several years before,* and of *abnormal EKGs* here later . . ." (emphasis supplied). In fact, the only records Petitioner had before it at the time it made its decision regarding LeRoy's insurability, other than the Providence Memorial Hospital records of August, 1958, indicated one prior incident of chest pain in 1947 (P-2)

and one subsequent abnormal EKG (P-24, 31, 32) taken in Southwestern General Hospital in March, 1959, when LeRoy had only pneumonia.

Dr. Ryan admitted (Tr. 236) that any underwriting decisions are based upon "subjective standards" and that "most decisions are arbitrary."

Mr. Logan testified (Tr. 245) that if none of the conditions listed by Petitioner as grounds for denying LeRoy's insurability (Tr. 198-200) in fact existed, that he "supposed" that LeRoy would have been insurable. He further testified (Tr. 295) that to be placed in the standard risk category by Petitioner all it expected was "that you be the *average of the population.* We don't expect you to be the cream, or even the middle. You can be blind in one eye, or deaf in one ear, or have *minor* impairments, but a *serious condition of the heart,* abnormal sugar in the urine, high blood pressure . . . those are all things the *average* person does not have . . ." (emphasis supplied). Mr. Logan also seemed more concerned with the medical history of an applicant than he was with the applicant's "good health" (Tr. 302, 303).

Special interrogatories in the form of Questions 1 and 1A (Tr. 339, 340) were submitted to the jury. In connection with Question 1, the Court charged the jury (Tr. 325, 326) "I instruct you that the company could not *arbitrarily* refuse the application, even though Mr. LeRoy was dead . . . they had to *act in good faith* and as a *reasonably prudent officer would have acted, just as if Mr. LeRoy was still living* . . . They had a right

and were required to take into consideration the company's rules and standards for determining insurability . . . *but they could not take into consideration the fact that he had been accidentally killed between the time he made his application and paid the first month's premium* . . ." (emphasis supplied).

In connection with Question 1A the Court charged the jury (Tr. 324) that "the term 'insurable risk' means the kind of risk a *reasonably prudent officer* in the underwriting department of an insurance company, *acting in good faith on the evidence available to him,* would find to be acceptable for the type of insurance applied for . . ." (emphasis supplied).

In response to Questions 1 and 1A the jury answered that Petitioner had not made its decision in good faith, and that LeRoy was insurable under Petitioner's rules and regulations for the insurance applied for.

## ARGUMENT

Questions 1 and 1A were submitted to the jury by the Court under authority of *United Founders Life Insurance Company v. Carey,* 363 S.W.2d 236 (Sup. Ct. of Texas), involving a conditional receipt very similar to the one in our case, and also involving the death of the applicant prior to the determination by the insurance company as to his insurability. Petitioner claims that the jury's finding in answer to Question 1A was not based on "competent testimony," as is required by *Blagg,* supra.

To support its contention, Petitioner argues that all of Respondent's testimony was concerned with the "good health" of LeRoy on July 5, 1963, as opposed to his "insurability" under the Petitioner's rules and practices. Petitioner cites (Petition, pp. 14 and 15) a New York State Court policy reinstatement case, holding that "insurability" can include facts other than "good health," such as insolvency or probability of suicide or execution under a death sentence. Respondent does not question the validity of this proposition, as a general matter, but respectfully submits that, under the evidence in the present case, there were no elements of "insurability" involved other than LeRoy's "good health." At least the jury under the evidence could have reasonably so concluded.

As for the asserted absence of any evidence of Petitioner's rules and regulations, Respondent submits that there was ample evidence that Robert H. LeRoy was at least the *average of the population* and that he had no *serious impairment* of his health under Petitioner's rules (Tr. 295). In any event, Respondent submits that the very nature of the case made it necessary for the evidence concerning Petitioner's rules and regulations to come from Petitioner's own employees. Dr. Ryan and Mr. Logan, who testified at length about them and their application to their decision concerning LeRoy's insurability. Such witnesses were not unbiased, but on the other hand were extremely *interested* in having their decision concerning the LeRoy application upheld, all of which was undoubtedly obvious to the jury, who were able to hear such witnesses and observe their demeanor. Under the circum-

stances tending to cast suspicion upon the testimony of these witnesses, which was far from clear, direct, positive and free from contradiction by attendant circumstances, there was ample evidence for the jury in its answer to Question No. 1A to reasonably conclude that Petitioner's rules and regulations were not such, if fairly applied by Petitioner's officers and agents to the facts available concerning LeRoy's health, as to make Robert H. LeRoy uninsurable under them. *Moss v. Hipp*, 387 S.W.2d 656 (Sup. Ct. of Texas).

Respondent would respectfully show the Court that the jury's answer to Special Interrogatory 1A was supported by "competent testimony," and there is no conflict between the decision of the Fifth Circuit below and the decision of the Texas Supreme Court in *Blagg*, supra.

## CONCLUSION

Respondent prays that the relief sought by Petitioner be in all things denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

Jack L. Brewster